



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9790]

RIN 1545-BN40

Treatment of Certain Interests in Corporations as Stock or Indebtedness; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final and temporary regulations (T.D. 9790) that were published in the Federal Register on Friday, October 21, 2016 (81 FR 72858). The regulations relate to the determination of whether an interest in a corporation is treated as stock or indebtedness for all purposes of the Internal Revenue Code.

DATES: These corrections are effective on January 23, 2017, and applicable October 21, 2016.

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SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations that are the subject of this correction are under sections 385 and 752 of the Internal Revenue Code.

Need for Correction

As published, the final and temporary regulations contain errors which may prove to be misleading and need to be clarified.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.385-1 is amended by revising the fifth sentence of paragraph (c)(4)(vii) Example 2 (i) to read as follows:

§1.385-1 General provisions.

* * * * *

(c) * * *

(4) * * *

(vii) * * *

Example 2. * * *

(i) * * * In addition to other assets representing 85% of the value of its total assets, S2 owns all of the stock of S3, which has elected to be treated as a taxable REIT subsidiary of S2 under section 856(l)(1). * * *

* * * * *

Par. 3. Section 1.385-2 is amended by:

1. Revising paragraph (a)(3)(ii)(C)(3).

2. Revising the third sentence of paragraph (a)(5)(i).
3. Revising the first sentence of paragraph (a)(5)(ii).
4. Revising the third sentence of paragraph (b)(1).
5. Revising the third sentence of paragraph (c)(2)(ii).
6. Revising the second sentence of paragraph (c)(2)(iii)(A).
7. Revising the third sentence of paragraph (c)(2)(iii)(E).
8. Revising the paragraph (c)(3)(i)(A) subject heading.
9. Revising the first sentence of paragraph (c)(3)(i)(A)(3)(i).
10. Revising the third sentence of paragraph (c)(4)(ii)(A).
11. Revising the second sentence of paragraph (c)(4)(ii)(B)(1).
12. Adding a subject heading to paragraph (c)(4)(ii)(B)(2)(i).
13. Revising the paragraph (c)(4)(ii)(E) subject heading.
14. Revising paragraph (c)(4)(ii)(E)(3).
15. Revising paragraph (d)(2)(i)(A).
16. Revising the second sentence of paragraph (e)(3)(ii).
17. Revising the paragraph (h)(4) Example introductory text.
18. Revising the second sentence of paragraph (h)(4)(ii)(A).
19. Revising the first sentence of paragraph (h)(4)(ii)(C).

The addition and revisions read as follows:

§1.385-2 Treatment of certain interests between members of an expanded group.

(a) * * *

(3) * * *

(ii) * * *

(C) * * *

(3) Overlapping assets and revenue. If there are multiple applicable financial statements that reflect the assets, portion of the assets, or revenue of the same expanded group member, any duplication (by stock, consolidation, or otherwise) of that expanded group member's assets or revenue may be disregarded for purposes of paragraph (a)(3)(ii) of this section such that the total assets or annual total revenue of that expanded group member is only reflected once.

* * * * *

(5) * * *

(i) * * * An issuer is also considered to have characterized an EGI as indebtedness if the issuer claims any federal income tax benefit with respect to an EGI resulting from characterizing the EGI as indebtedness for federal tax purposes, such as by claiming an interest deduction under section 163 with respect to interest paid or accrued on the EGI on a federal income tax return (or, if the issuer is a member of a consolidated group, the issuer or the common parent of the consolidated group claims a federal income tax benefit by claiming such an interest deduction), or if the issuer reports the EGI as indebtedness or amounts paid or accrued on the EGI as interest on an applicable financial statement. * * *

(ii) * * * The consistency rule in paragraph (a)(5)(i) of this section and section 385(c)(1) does not apply with respect to an EGI to the extent that the EGI is treated as stock under this section or §1.385-3, or it has been determined that the EGI is treated as stock under applicable federal tax principles. * * *

(b) * * *

(1) * * * If the documentation and information described in paragraph (c) of this section are not prepared and maintained with respect to an EGI in accordance with this section, and no exception listed in paragraph (b)(2) of this section applies, the EGI is treated as stock for all federal tax purposes. * * *

* * * * *

(c) * * *

(2) * * *

(ii) * * * The rights of a creditor must include rights that superior to the rights of shareholders (other than holders of interests treated as stock solely by reason of §1.385-3 and holders of interests with creditor's rights under commercial law treated as stock under this section) to receive assets of the issuer in case of dissolution. * * *

(iii) * * *

(A) * * * Documentation with respect to an EGI that is nonrecourse under its terms must include information on any cash and property that secures the EGI, including--

* * * * *

(E) * * * Documentation required under paragraph (c)(2) of this section may be prepared by employees of expanded group members, by agents of expanded group members, or by third parties.

(3) * * *

(i) * * *

(A) Revolving credit, omnibus, umbrella, master, cash pool, and similar agreements--

(3) * * *

(i) * * * If an EGI is issued under an agreement described in paragraph (c)(3)(i)(A) of this section, written documentation must be prepared with respect to the analysis date and written documentation with a new analysis date must be prepared at least annually to satisfy the requirements in paragraph (c)(2)(iii) of this section for EGIs issued under such an agreement on or after the most recent analysis date. * * *

* * * * *

(4) * * *

(ii) * * *

(A) * * * In the case of an applicable interest that becomes an EGI subsequent to issuance, including an intercompany obligation, as defined in §1.1502-13(g)(2)(ii), that ceases to be an intercompany obligation, the relevant date is the date on which the applicable interest becomes an EGI.

(B) * * *

(1) * * * In the case of an applicable interest that becomes an EGI subsequent to issuance, the relevant date is the date on which the applicable interest becomes an EGI and any relevant date after the date that the applicable interest becomes an EGI.

(2) * * *

(i) In general. * * *

* * * * *

(E) Revolving credit, omnibus, umbrella, master, cash pool, and similar

agreements—

* * * * *

(3) Relevant dates for EGIs documented under an overall arrangement. A relevant date of an EGI under paragraphs (c)(4)(ii)(A) through (C) of this section is also a relevant date for each EGI documented under an overall arrangement described in paragraph (c)(3) of this section.

* * * * *

(d) * * *

(2) * * *

(i) * * *

(A) Any interest that is issued or deemed issued in the legal form of a debt instrument (including a draw or separate amount borrowed under an overall arrangement described in paragraph (c)(3) of this section regardless of whether a separate legal document is issued in connection with the draw or separate amount borrowed), which therefore does not include, for example, a sale-repurchase agreement treated as indebtedness under federal tax principles; or

* * * * *

(e) * * *

(3) * * *

(ii) * * * For purposes of determining whether an EGI originally treated as indebtedness ceases to be treated as indebtedness by reason of this section, the rules of this section apply before the rules of § 1.1001-3. * * *

* * * * *

(h) * * *

(4) * * *

Example. Application of paragraphs (c)(2)(iii) and (c)(4) of this section to an EGI.

* * *

(ii) * * *

(A) * * * Because FP is traded on an established financial market within the meaning of §1.1092(d)-1(b) and USS1 is a covered member, EGI A, EGI B, and EGI C are subject to the rules of this section.

* * * * *

(C) The credit analysis was prepared with an analysis date of Date B of Year 1. *

* * * * *

Par. 4. Section 1.385-3 is amended by:

1. Revising paragraph (b)(3)(iii)(E)(2).

2. Revising the paragraph (b)(5) subject heading.

3. Revising the first sentence of paragraph (c)(3)(i)(C)(1).

4. Revising the paragraph (c)(3)(i)(C)(3) subject heading.

5. Revising paragraph (c)(3)(i)(C)(3)(i).

6. Adding subject headings to paragraphs (g)(3)(ii) introductory text, (g)(3)(iii) introductory text, and (g)(3)(iv) introductory text.

7. Revising paragraph (g)(3)(iv)(B)(1).

8. Adding a subject heading to paragraph (g)(3)(v).

10. Revising paragraphs (g)(24)(ii)(B) and (C)

The additions and revisions read as follows:

§1.385-3 Transactions in which debt proceeds are distributed or that have a similar effect.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(E) * * *

(2) Effect of certain modifications. Notwithstanding paragraph (b)(3)(iii)(E)(1) of this section, if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001-3(b) and the modification, or one of the modifications, that results in the deemed exchange includes the substitution of an obligor on the covered debt instrument, the addition or deletion of a co-obligor on the covered debt instrument, or the material deferral of scheduled payments due under the covered debt instrument, then the modified covered debt instrument is treated as issued on the date of the deemed exchange for purposes of paragraph (b)(3)(iii)(A) of this section.

* * * * *

(5) Coordination between general rule and funding rule. * * *

* * * * *

(c) * * *

(3) * * *

(i) * * *

(C) * * *

(1) * * * The term expanded group earnings means, with respect to a covered member and an expanded group period of the covered member, the earnings and profits accumulated by the covered member during the expanded group period, computed as of the close of the taxable year of the covered member, without diminution by reason of any distributions or acquisitions by the covered member described in paragraphs (b)(2) and (b)(3)(i) of this section. * * *

* * * * *

(3) Look-through rule for dividends--(i) In general. For purposes of paragraph (c)(3)(i)(C)(1) of this section, a dividend from a member of the same expanded group (distributing member) is not taken into account for purposes of calculating a covered member's expanded group earnings, except to the extent the dividend is attributable to earnings and profits accumulated by the distributing member in a taxable year ending after April 4, 2016, during its expanded group period (qualified earnings and profits). For purposes of the preceding sentence, a dividend received from a member (intermediate distributing member) is not taken into account for purposes of calculating the qualified earnings and profits of a distributing member (or another intermediate distributing member), except to the extent the dividend is attributable to qualified earnings and profits of the intermediate distributing member. A dividend from a distributing member or an intermediate distributing member is considered to be attributable to qualified earnings and profits to the extent thereof. If the distributing member or the intermediate distributing member is not a covered member, the expanded group period of the member is determined under the principles of paragraph (c)(3)(i)(E) of this section. If a controlled partnership receives a dividend from a

distributing member and a portion of the dividend is allocated (including through one or more partnerships) to a covered member, then, for purposes of this paragraph (c)(3)(i)(C)(3), the covered member is treated as receiving the dividend from the distributing member.

* * * * *

(g) * * *

(3) * * *

(ii) Qualified dealer debt instrument. * * *

(iii) Excluded statutory or regulatory debt instrument. * * *

(iv) Excepted regulated financial company. * * *

(B) * * *

(1) General rule. For purposes of paragraph (g)(3)(iv) of this section, except as otherwise provided in paragraph (g)(3)(iv)(B)(2) of this section, the term regulated financial group means any expanded group of which a covered member that is a regulated financial company within the meaning of paragraphs (g)(3)(iv)(A)(1) through (10) of this section would be the expanded group parent if no person owned, directly or indirectly (as defined in §1.385-1(c)(4)(iii)), the regulated financial company. A domestic eligible entity (within the meaning of §301.7701-5(a) of this chapter) treated as a partnership or disregarded as an entity separate from its owner is, for purposes of this paragraph (g)(3)(iv)(B), also treated as a covered member.

* * * * *

(v) Regulated insurance company. * * *

(24) * * *

(ii) * * *

(B) A distribution or acquisition by either the seller or a successor seller to or from either the acquirer, the seller, or a successor seller is not treated as described in paragraph (b)(3) of this section for purposes of applying paragraph (b)(3) of this section to a covered debt instrument of the acquirer. For purposes of the preceding sentence, the term successor seller means a member of the expanded group that receives property (other than expanded group stock) in a distribution or acquisition from the seller or another successor seller and is controlled by the acquirer as determined under the principles of paragraph (c)(2)(i) of this section. A successor seller is treated as a successor to the acquirer to the extent of the value of the property received in a distribution or acquisition described in the preceding sentence and, for purposes of applying this paragraph (g)(24)(ii)(B).

(C) To the extent that a covered debt instrument of the acquirer is treated as funding a distribution or acquisition by the seller or successor seller described in paragraphs (b)(3)(i)(A) through (C) of this section, or would be treated but for the exceptions described in paragraphs (c)(3)(i) and (ii) of this section, the value of the expanded group stock described in paragraph (g)(24)(ii)(A) of this section is reduced by an amount equal to the distribution or acquisition for purposes of any further application of paragraph (g)(24)(ii)(A) of this section with respect to the acquirer and seller.

* * * * *

Par. 5. Section 1.385-3T is amended by:

1. Revising the third sentence of paragraph (b)(3)(vii)(A)(1)(iii).
2. Revising the fifth sentence and adding a new sixth sentence to paragraph (h)

Example 13(i).

3. Revising the third sentence of paragraph (h) Example 13(ii)(D).
4. Revising the third sentence of paragraph (h) Example 14(ii)(D).
5. Revising paragraph (h) Example 15(i).
6. Revising the fifth sentence of paragraph (h) Example 18(ii)(A).
7. Revising paragraph (l).

The revisions read as follows:

§1.385-3T Certain distributions of debt instruments and similar transactions (temporary).

* * * * *

(b) * * *

(3) * * *

(vii) * * *

(A) * * *

(1) * * *

(iii) * * * Additionally, the amount owed by any issuer shall be reduced by the amount of the issuer's deposits with a qualified cash pool header, but only to the extent of amounts borrowed from the same qualified cash pool header that satisfy the requirements of paragraph (b)(3)(vii)(A)(2) (if the covered debt instrument was issued in a prior taxable year) or (b)(3)(vii)(A)(1)(ii) of this section.

* * * * *

(h) * * *

Example 13. * * *

(i) * * * On Date A in Year 1, FP lends \$200x to PRS in exchange for PRS Note with stated principal amount of \$200x, which is payable at maturity. PRS Note also provides for annual payments of interest that are qualified stated interest. * * *

(ii) * * *

(D) * * * Similarly, FP is deemed to transfer a portion of PRS Note with a principal amount equal to \$90x (the adjusted issue price of the specified portion with respect to USS2) to USS2 in exchange for deemed partner stock in USS2 with a fair market value of \$90x. * * *

Example 14. * * *

(ii) * * *

(D) * * * Similarly, FP is deemed to transfer a portion of PRS Note with a principal amount equal to \$90x (the adjusted issue price of the specified portion with respect to USS2) to USS2 in exchange for stock of USS2 with a fair market value of \$90x. * * *

Example 15. * * *

(i) Facts. The facts are the same as in Example 13 of this paragraph (h)(3), except that USS2 does not distribute \$90x to FP until Date C in Year 2, which is less than 36 months after Date A in Year 1. On Date C in Year 2, DS's, USS2's, and USP's issuance percentages under paragraph (g)(16) of this section are unchanged at 45%, 45%, and 10%, respectively.

* * * * *

Example 18. * * *

(ii) * * *

(A) * * * DS's distribution to USS1 is a disregarded distribution because it is a distribution between members of a consolidated group that is disregarded under the one-corporation rule described in §1.385-4T(b)(1). * * *

* * * * *

(l) Expiration date. This section expires on October 13, 2019.

Par. 6. Section 1.385-4T is amended by:

1. Revising the first sentence of paragraph (b)(2).

2. Revising the first sentence of paragraph (b)(3)(i).
3. Revising paragraphs (b)(3)(ii) and (iii).
4. Revising paragraph (b)(4)(ii)(A)(1).
5. Revising paragraph (b)(5)(i).
6. Revising the first sentence of paragraph (b)(6).
7. Revising the first sentence of paragraph (c)(1)(i).
8. Revising the first sentence of paragraph (d)(3).
9. Revising the first sentence of paragraph (d)(4) introductory text.
10. Revising paragraphs (d)(4)(i) and (ii).
11. Revising paragraph (e)(3).
12. Revising paragraph (e)(5).
13. Revising the second sentence of paragraph (f)(3) Example 1(ii).
14. Revising the seventh sentence of paragraph (f)(3) Example 4(ii).
15. Revising the sixth sentence of paragraph (f)(3) Example 5(ii).
16. Revising paragraph (h).

The revisions read as follows:

§1.385-4T Treatment of consolidated groups.

* * * * *

(b) * * *

(2) * * * The one-corporation rule described in paragraph (b)(1) of this section does not apply in determining the members of an expanded group. * * *

(3) * * *

(i) * * * If a covered debt instrument treated as issued by a consolidated group

under the one-corporation rule described in paragraph (b)(1) of this section is treated as stock under §§1.385-3 or 1.385-3T, the covered debt instrument is treated as stock in the member of the consolidated group that would be the issuer of such debt instrument without regard to this section. * * *

(ii) Application of the covered debt instrument exclusions. For purposes of determining whether a debt instrument issued by a member of a consolidated group is a covered debt instrument, each test described in §1.385-3(g)(3) is applied on a separate member basis without regard to the one-corporation rule described in paragraph (b)(1) of this section.

(iii) Qualified short-term debt instrument. The determination of whether a member of a consolidated group has issued a qualified short-term debt instrument for purposes of §1.385-3(b)(3)(vii) is made on a separate member basis without regard to the one-corporation rule described in paragraph (b)(1) of this section.

(4) * * *

(ii) * * *

(A) * * *

(1) A qualified contribution to any member of a consolidated group that remains a member of the consolidated group immediately after the qualified contribution from a person other than a member of the same consolidated group is treated as made to the one corporation described in paragraph (b)(1) of this section;

* * * * *

(5) * * *

(i) First, determine the characterization of the transaction under federal tax law

without regard to the one-corporation rule described in paragraph (b)(1) of this section.

* * * * *

(6) * * * For purposes of this section and §§1.385-3 and 1.385-3T, and notwithstanding the one-corporation rule described in paragraph (b)(1) of this section, a partnership that is wholly owned by members of a consolidated group is treated as a partnership. * * *

* * * * *

(c) * * *

(1) * * *

(i) * * * For purposes of this section and §§1.385-3 and 1.385-3T, when a debt instrument ceases to be a consolidated group debt instrument as a result of a transaction in which the member of the consolidated group that issued the instrument (the issuer) or the member of the consolidated group holding the instrument (the holder) ceases to be a member of the same consolidated group but both the issuer and the holder continue to be members of the same expanded group, the issuer is treated as issuing a new debt instrument to the holder in exchange for property immediately after the debt instrument ceases to be a consolidated group debt instrument. * * *

* * * * *

(d) * * *

(3) * * * If a departing member has issued a covered debt instrument (determined without regard to the one-corporation rule described in paragraph (b)(1) of this section) that is not a consolidated group debt instrument and that is not treated as stock immediately before the departing member ceases to be a consolidated group member,

then the departing member (and not the consolidated group) is treated as issuing the covered debt instrument on the date and in the manner the covered debt instrument was issued. * * *

(4) * * * This paragraph (d)(4) applies when a departing member ceases to be a consolidated group member in a transaction other than a distribution to which section 355 (or so much of section 356 as relates to section 355) applies, and the consolidated group has made a regarded distribution or acquisition. * * *

(i) If the departing member made the regarded distribution or acquisition (determined without regard to the one-corporation rule described in paragraph (b)(1) of this section), the departing member (and not the consolidated group) is treated as having made the regarded distribution or acquisition.

(ii) If the departing member did not make the regarded distribution or acquisition (determined without regard to the one-corporation rule described in paragraph (b)(1) of this section), then the consolidated group (and not the departing member) continues to be treated as having made the regarded distribution or acquisition.

(e) * * *

(3) Disregarded distribution or acquisition. The term disregarded distribution or acquisition means a distribution or acquisition described in §1.385-3(b)(2) or (b)(3)(i) between members of a consolidated group that is disregarded under the one-corporation rule described in paragraph (b)(1) of this section.

* * * * *

(5) Regarded distribution or acquisition. The term regarded distribution or acquisition means a distribution or acquisition described in §1.385-3(b)(2) or (b)(3)(i)

that is not disregarded under the one-corporation rule described in paragraph (b)(1) of this section.

(f) * * *

(3) * * *

Example 1. * * *

(ii) * * * Pursuant to paragraph (b)(5)(i) of this section, the transaction is first analyzed without regard to the one-corporation rule described in paragraph (b)(1) of this section, and therefore UST is treated as issuing a covered debt instrument in exchange for expanded group stock. * * *

* * * * *

Example 4. * * *

(ii) * * * Under paragraph (c)(1)(i) of this section, for purposes of §1.385-3, DS1 is treated as issuing a new debt instrument to USS1 in exchange for property immediately after DS1 Note ceases to be a consolidated group debt instrument. * * *

Example 5. * * *

(ii) * * * Under paragraph (c)(1)(i) of this section, for purposes of §1.385-3, DS1 is treated as issuing a new debt instrument to USS1 in exchange for property immediately after DS1 Note ceases to be a consolidated group debt instrument. * * *

* * * * *

(h) Expiration date. This section expires on October 13, 2019.

Par. 7. Section 1.752-2T is amended by revising paragraph (m)(2) to read as follows:

§1.752-2T Partner's share of recourse liabilities (temporary).

* * * * *

(m) * * *

(2) Paragraphs (c)(3) and (l)(4) of this section expire on October 13, 2019.

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